DEPARTMENT OF STATE REVENUE

04-20100705.LOF

Letter of Findings: 04-20100705
Gross Retail Tax
For the Years 2007, 2008, and 2009

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Demonstrator Cars – Gross Retail Tax.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-2.5-3-1(a); IC § 6-2.5-3-2(a); IC § 6-2.5-4-1(b), (c); IC § 6-8.1-5-1(c); USAir, Inc. v. Ind. Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax. Ct. 1993); Rhoade v. Ind. Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); 45 IAC 2.2-3-20; Tax Policy Directive 8 (September 2009).

Taxpayer argues that the Department of Revenue erred in determining that Taxpayer owed sales/use tax on demonstrator vehicles.

II. Capital Assets – Gross Retail Tax.

Authority: IC § 6-2.5-3-1(a); IC § 6-2.5-3-2(a); IC § 6-2.5-5-8(c)(1); 45 IAC 2.2-3-20.

Taxpayer maintains that its purchase of three vehicles was not subject to sales/use tax.

STATEMENT OF FACTS

Taxpayer is an Indiana car dealership. Taxpayer sells new and used vehicles. Taxpayer also sells car parts and provides repair services to its customers.

The Department of Revenue (Department) conducted an audit review of Taxpayer's business records. The audit concluded that Taxpayer owed additional sales/use tax and issued an audit report and proposed assessments. Taxpayer disagreed with a portion of the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. Certain of Taxpayer's objections were addressed following the administrative hearing but before this Letter of Findings was drafted. This Letter of Findings addresses Taxpayer's unresolved objections.

I. Demonstrator Cars – Gross Retail Tax.

DISCUSSION

The Department's audit found that Taxpayer did not report taxable use on demonstrator vehicles which were driven by persons other than full-time salespersons. Taxpayer maintained mileage records for each vehicle which were used to determine an amount of additional use tax.

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). Use means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to the sales tax. See Rhoade v. Ind. Dep't of State Revenue, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002). By complementing the sales tax, the use tax ensures that non-exempt retail transactions (particularly out-of-state retail transactions) that escape sales tax liability are nevertheless taxed. Rhoade, Id. at 1047; USAir, Inc. v. Ind. Dep't of State Revenue, 623 N.E.2d 466, 468–69 (Ind. Tax. Ct. 1993). The use tax ensures that, after such goods arrive in Indiana, the retail purchasers of the goods bear their fair share of the tax burden. To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. Id. A taxable retail transaction occurs when; (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that property is then exchanged between parties for consideration; and (3) the property is used in Indiana. See IC § 6-2.5-1-2; IC § 6-2.5-4-1(b), (c); IC § 6-2.5-3-2(a).

As authority for the particular assessment at issue, the audit report cites to 45 IAC 2.2-3-20 which states:

> All purchases of tangible personal property which are delivered to the purchaser for storage, use, or consumption in the state of Indiana are subject to the use tax. The use tax must be collected by the seller if he is a retail merchant described in Reg. 6-2.5-3-6(b)(010) [45 IAC 2.2-3-19] or if he has Departmental permission to collect the tax. If the seller is not required to collect the tax or fails to collect the tax when required to do so, the purchaser must remit the use tax directly to the Indiana Department of Revenue.

In addition, the audit report cites to Tax Policy Directive 8 (September 2009), 20090930 Ind. Reg. 045090767NRA. The Directive states that it is intended to "provide interpretation of the Indiana Sales and Use Tax as it applies to the use of demonstrator automobiles, both new and used." The Directive states that use of demonstrator automobiles by individuals other than full-time salespersons is subject to sales/use tax as follows:

> Vehicles provided to other than full-time salespersons (for example family members, part-time sales persons, mechanics, managers of the dealership, and other individuals) are subject to use tax at a rate calculated as the Internal Revenue's Services optional business standard mileage rate times the Indiana sales tax rate. The vehicle dealer is required to pay the tax annually. Dealers are required to keep records of each vehicle, the miles driven, and when use tax was paid for the miles driven. In lieu of accounting for the miles driven, the dealer may elect to report the use tax on 2 percent of the dealer's cost of purchasing the vehicle for each month (or fraction of a month) that the vehicle is used as a demonstrator multiplied by the Indiana sales tax rate. Id.

Taxpayer objects to the computation arguing that "the cost of the demonstrator vehicle is much more accurate on which to assess the excise tax." Taxpayer points to Tax Policy Directive 8 which, according to Taxpayer, indicates that a dealership may "elect to report the use tax on two percent of the dealer's vehicle cost for each month the vehicle is used as a demonstrator."

In addition, Taxpayer states that certain of its mileage records are flawed and that information provided to the Department's audit representative was incorrect or duplicated.

In determining whether to accept Taxpayer's alternative sales/use tax calculation, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

Taxpayer suggests the sales/use tax should be calculated based on each demonstrator vehicle's cost rather than Taxpayer's mileage records. In addition, Taxpayer suggests that some of the records are inherently flawed. For example, Taxpayer points to one set of records which seem to indicate that one of Taxpayer's employees drove more than 100,000 miles in a single year. Taxpayer also suggests that some of the mileage worksheets duplicate mileage figures from one set of worksheets to another.

The issue is whether the Taxpayer has met its burden of demonstrating that the sales/use tax assessment is wrong. Although the Taxpayer has suggested an alternative calculation based on the price of the demonstrator vehicles and has pointed to what may – or may not – be errors in Taxpayer's own records, the Department is unable to agree that the Taxpayer has met the burden imposed by IC § 6-8.1-5-1(c). There is simply not enough information to justify substituting one set of calculations for another.

FINDING

Taxpayer's protest is respectfully denied.

II. Capital Assets – Gross Retail Tax.

DISCUSSION

The Department assessed Taxpayer use tax on three automobiles. The audit report states that, "These items were purchased from individuals and were never licensed; therefore no sales tax was ever paid. These vehicles were used as displays for more than a year. At a later date, the vehicles were transferred to inventory and sold. Sales tax was collected on the transaction[s]."

The audit assessed Taxpayer use tax "[d]ue to the fact the [T]axpayer originally purchased these vehicles as displays and listed them on their depreciation schedule and not as inventory the vehicles are subject to Indiana use tax."

As authority for assessing tax, the audit report cites to 45 IAC 2.2-3-20 which states in part that "purchases of tangible personal property which are delivered to the purchaser for storage, use, or consumption in the state of Indiana are subject to the use tax."

Taxpayer objects to the imposition of sales/use tax on one of the three vehicles. Taxpayer explains as follows:

> In 2007 on opening the new facility for the dealership, [T]axpayer purchased [1953 vehicle] and a [2004 Vehicle]. The [T]axpayer initially capitalized and depreciated both of these vehicles. While the [1953 vehicle] remains as a decorative fixture in the dealership's showroom, the [2004 Vehicle] was sold at retail with income recognized to the extent sales price exceeded depreciated value. Sales tax was also collected and remitted on the retail sale[s] price.

Taxpayer explains that although the 2004 Vehicle was not sold until 2009, the decision to sell the vehicle was made in 2008. Taxpayer states that "since the decision was made to sell the [2004 Vehicle] occurred long before the actual sale, use tax should not be assessed."

Indiana imposes its complementary excise tax called "use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). Use means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a).

Taxpayer acquired the 2004 Vehicle for its new dealership with the intention of retaining the vehicle as a display item. The intention to retain the vehicle is demonstrated by its decision to capitalize and depreciate this particular vehicle. As such, the original acquisition of the 2004 Vehicle triggered imposition of the use tax because the 2004 Vehicle was acquired in a "retail transaction and the vehicle was subsequently "used" in Indiana. IC §

6-2.5-3-2(a); IC § 6-2.5-3-1(a). Taxpayer seems to suggest that the Department is functionally imposing the same tax twice, but Taxpayer should bear in mind that the neither the sales nor the use tax is imposed on the tangible personal property itself; both taxes are imposed on the individual transaction underlying the event triggering imposition of either the sales or the use tax. In this case, the Taxpayer acquired a vehicle which it intended to "use" in Indiana. Subsequently, Taxpayer sold the vehicle to one of its customers an event which triggered imposition of the sales tax. The two transactions triggered imposition of two different taxes.

It should be noted that the exemption normally available to automobile dealers such as Taxpayer and found at IC § 6-2.5-5-8(c)(1) is inapplicable because the 2004 Vehicle was not acquired "for resale, rental, or leasing in the ordinary course of [Taxpayer's] business." Id. The 2004 Vehicle was acquired as a display item at Taxpayer's dealership facility.

Taxpayer has not met its burden of demonstrating that the Department erroneously assessed use tax on the vehicles.

FINDING

Taxpayer's protest is respectfully denied.

Posted: 10/26/2011 by Legislative Services Agency
An html version of this document.